No. 14657.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Exchange Lemon Products Company, a corporation,

Appellant,

vs.

The Home Insurance Company,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

PAGE

Jurisdiction 1

Statement of the case 3

Statement of the issues 5

Summary of argument 5

Argument 6

Point One. There was no error in not impaneling a jury 6

Point Two. Evidence of claimed trade usage was properly excluded 8

(a) Defendant's offer of proof is defective 11

Conclusion 13

TABLE OF AUTHORITIES CITED

Cases

PAGE

Ames Mercantile Company v. Kimball S.S. Co., 125 Fed. 332.... 12
Anzano v. Metropolitan Life Ins. Co. of New York, 118 F. 2d 430 6
Bradner v. Vasquez, 102 Cal. App. 2d 338, 227 P. 2d 559........ 9
Browning v. McNear, 158 Cal. 525.......... 10
Burr v. Western States Life Ins. Co., 211 Cal. 576, 296 Pac. 273 8
Chidester v. City of Newark, 162 F. 2d 598.......... 6
Crabb v. Commissioner of Internal Revenue, 121 F. 2d 1015.... 6
Crowe v. Gary State Bank, 123 F. 2d 513.......... 6
Federal Deposit Ins. Corp. v. Siraco, 174 Fed. 360.......... 6
Hargrove v. American Cent. Ins. Co., 125 F. 2d 225.......... 8
May v. American Trust Co., 135 Cal. App. 385.......... 10
Morton v. Travelers Indemnity Company, 121 Cal. App. 2d (Supp.) 855, 263 P. 2d 337.......... 8
Orient Mutual Ins. v. Wright, 68 U. S. 456, 17 L. Ed. 505........ 10
Schmidt v. Mano Const. Co., 119 Cal. App. 2d 242, 244 P. 2d 457 12
Shipley v. Pittsburgh L. E. R. Co., 68 Fed. Supp. 395.......... 12
State Farm Mut. Auto Ins. Co. v. Mossey, 195 F. 2d 56.......... 8

Rules

Rules for the United States Court of Appeals, Ninth Circuit, Rule 20 1

Statutes

Civil Code, Sec. 1641.......... 8
United States Code Annotated, Title ......, Sec. 9, Subsec. 2b...... 1
United States Code Annotated, Title 28, Sec. 1291.......... 2
United States Code Annotated, Title 28, Sec. 1332.......... 2
United States Code Annotated, Title 28, Sec. 2201.......... 1

Textbook

53 American Jurisprudence, Sec. 268.......... 7

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Appellant,

vs.

THE HOME INSURANCE COMPANY,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

In compliance with Rule 20 (U. S. C. A. 9, Subsec. 2b) appellee states that the statutory provisions believed to sustain the jurisdiction of the District Court to render judgment and of this Court upon appeal to review the judgment are as follows:

> UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 2201: DECLARATORY JUDGMENTS: CREATION OF REMEDY.
>
> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other

legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 1332: DISTRICT COURTS; JURISDICTION: DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY.

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

"(1) Citizens of different States; * * *."

UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 1291: COURTS OF APPEAL: FINAL DECISIONS OF DISTRICT COURTS.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

The necessary diversity of citizenship arose from the fact that the plaintiff is a citizen and resident of New York and the defendant is a citizen and resident of California. The amount in controversy exceeds the sum of $3,000.00 exclusive of interest and costs of suit [Tr. pp. 3-4, 10].

Statement of the Case.

Appellant, Exchange Lemon Products Company, a corporation, (hereinafter referred to as "Exchange Lemon"), has appealed from a judgment rendered in favor of appellee, The Home Insurance Company, a corporation, (hereinafter referred to as "Home Insurance"), after the court refused to admit the offer of evidence by appellant. Declaratory relief action was brought by Home Insurance against Exchange Lemon, praying for a declaration of the respective rights, duties and liabilities of the parties upon a policy of insurance issued by Home Insurance, which contained the following clause:

> "This policy covers while the insured's property is in due course of transit on any truck, trailer, railroad, car or other conveyance, whether such vehicles are owned by Assured or not. This policy also covers while on docks, wharves, piers, bulkheads, in depots, warehouses, stations and/or on platforms, but only while in due course of transit and not if such property is in storage." [Tr. p. 23.]

Exchange Lemon, by its amended counter-claim [Tr. pp. 10-13] prayed for judgment against Home Insurance in the amount of $161,991.63 and prayed for a declaration that the property damaged and destroyed was insured by Home Insurance.

It was stipulated in a pre-trial order that all of the goods destroyed had been in Crooks Terminal Warehouse, in Kansas City, Missouri, for a period of 8 months or more prior to the damage [Tr. p. 18], at the time of its destruction by flood the property was stored in the

warehouse awaiting further orders, and at the time of its destruction no orders or shipping instructions had been received or issued by the defendant [Tr. p. 19]. The bills of lading and freight bills under which the goods moved showed that the goods were consigned from Corona, California by defendant Exchange Lemon to Exchange Lemon, care Crooks Terminal Warehouse, Kansas City, Missouri, with the words "destination Kansas City" in the bills of lading [Tr. pp. 29-30]. The policy of insurance insures, among other things, against fire [Tr. p. 32, numbered Par. 1]. It was stipulated in the pre-trial order that the identical goods insured by Home Insurance under its transportation policy were also insured by plaintiff Home Insurance against loss by fire while in Crooks Terminal Warehouse under a different policy [Tr. p. 19, numbered Par. 11].

By the pre-trial order and stipulation it was agreed that the *Issues of Law* were whether defendant was entitled to introduce testimony to the effect that there was a trade usage, whether the goods were in due course of transit, whether the goods were in storage, and whether there was any ambiguity in the terms of the policy [Tr. pp. 20-21]. It was also stipulated in the pre-trial order that there were no issues of fact for trial unless

> "* * * the court rules on the issue of law that the defendant is entitled to introduce testimony to the effect that at the time the insurance policy involved in this action was issued, there was in existence any trade terminology or technical meaning in the transportation trade for the term 'in due course of transit'." [Tr. pp. 19, 67.]

Statement of the Issues.

The sole issue tendered by this appeal is a question of law as to whether the court correctly held that no evidence of trade usage could be introduced under a contract provision insuring goods "only while in due course of transit and not if such property is in storage" where it was stipulated that such evidence could only be admitted if the court ruled as a matter of law that it could be admitted, and that whether the goods were in due course of transit or in storage and whether there was any ambiguity in the policy were issues of law, that although the goods were registered for storage in transit with the carrier the stipulated facts show that the goods were at the destination shown on their bills of lading, had been there for at least 8 months, that no further orders were on hand for shipment of the goods, and that the insured actually insured its interest in the identical goods, for loss by fire under a separate policy while in storage at its destination.

Summary of Argument.

Point One—There Was No Error in Not Impaneling a Jury.

Point Two—Evidence of Claimed Trade Usage Was Properly Excluded.

Point Two (a)—Defendant's Offer of Proof Is Defective.

ARGUMENT.

POINT ONE.

There Was No Error in Not Impaneling a Jury.

The pre-trial stipulation and order provided that whether or not Exchange Lemon would be entitled to introduce evidence of trade terminology or technical meaning of the phrase "in due course of transit" was an issue of law [Tr. p. 20]. By the same stipulation it was agreed that whether the goods were "in due course of transit" or "in storage" where issues of law [Tr. p. 20], and that whether there was any ambiguity in the terms of the policy defining its coverage was an issue at law [Tr. pp. 20-21].

It is thus apparent that by the stipulation of the parties the issue of whether or not evidence would or could be admitted on appellant's claimed trade usage was a preliminary question to be decided by the court without a jury. It does not appear to be an open question that parties may, by stipulation, broaden or narrow the issues or change the rules of evidence. (See: *Fed. Deposit Ins. Corp. v. Siraco* (C. A., N. Y. 1949), 174 Fed. 360.)

It is, moreover, a common and well recognized rule that the construction of writings and the meanings of a written instrument is a "question of law for the court" rather than a "question of fact" for the jury.

> *Crowe v. Gary State Bank,* 123 F. 2d 513;
>
> *Anzano v. Metropolitan Life Ins. Co. of New York,* 118 F. 2d 430;
>
> *Chidester v. City of Newark,* 162 F. 2d 598;
>
> *Crabb v. Commissioner of Internal Revenue,* 121 F. 2d 1015.

The rule is succinctly stated in American Jurisprudence, Vol. 53, Trial, Sec. 268:

> "Written Contracts.—The question whether a writing is, upon its face, a complete expression of the agreement of the parties is one for the court, and subject to qualifications where the contract is uncertain and ambiguous, particularly where extrinsic evidence has been introduced surrounding facts and circumstances bearing upon intention of the parties the general rule is that where a contract has been reduced to writing, its interpretation, construction, or legal effect is for the court and not for the jury. * * * In other words, where a clear meaning can be ascertained without resort to extrinsic facts, the interpretation of a writing is for the court."

Under the stipulation of the parties and the cases cited, there was no right to a jury trial since there were no issues of fact to be tried in the determination of whether or not any evidence might be admitted on the interpretation of the written contract of insurance.

Although clearly defendant Exchange Lemon would not be entitled to a jury trial on the question of admissibility of evidence, which is the only question presented on this appeal, it further appears that no right to a jury trial would exist in any event. The parties, by stipulation, have conceded the amount of damages if the plaintiff's liability can be established [Tr. p. 19, numbered Par. 6] and have stipulated that whether defendant Exchange Lemon was entitled to introduce testimony to the effect that there was in existence any trade terminology or technical meaning for the term "in due course of transit" is an issue of law. Thus the parties by their

own agreement have limited the issues as presented in this appeal to legal matters not triable by jury.

See:

Hargrove v. American Cent. Ins. Co., 125 F. 2d 225;

State Farm Mut. Auto Ins. Co. v. Mossey, 195 F. 2d 56.

POINT TWO.

Evidence of Claimed Trade Usage Was Properly Excluded.

The policy carries the caption "Transportation Policy" and it is evident from its terms and from the stipulated facts that it was the intention of the parties to cover the goods only while being transported. Appellant complains that an ambiguity exists because of the words "in due course of transit" and of the refusal by the trial court to allow evidence of "trade" usage. It was held, however, by the trial court that "the language of the contract is unambiguous and is clearly suceptible of but one interpretation" [Tr. p. 72].

In arriving at its decision, the lower court followed familiar rules: California Civil Code, Sec. 1641: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other;" "No term of a contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof," (*Burr v. Western States Life Ins. Co.,* 211 Cal. 576, 296 Pac. 273, 276; *Morton v. Travelers Indemnity Company,* 121 Cal. App. 2d Supp. 855, 263 P. 2d 337); "It must be presumed that the parties meant something by

the language used," (*Bradner v. Vasquez,* 102 Cal. App. 2d 338, 227 P. 2d 559). The arguments in appellant's brief entirely ignore the fact that the contract specifically exempts coverage "if such property is in storage" [Tr. p. 34] and states "It is understood and agreed that this policy covers shipments * * * [Tr. p. 24]. Nor does the defendant attempt by its brief or by its offer of proof to assign any meaning to the phrase "not while such property is in storage" other than what is normally meant by these words [Tr. pp. 43-44].

That the property was, in fact, "in storage," is demonstrated by the stipulated facts:

> "It was consigned by Exchange Lemon to Exchange Lemon at Kansas City and was wholly owned by Exchange Lemon at all times" [Tr. pp. 18, 29-30];
>
> "The bills of lading showed the destination of the goods to be Kansas City" [Tr. pp. 29-30];
>
> "No further orders or shipping instructions had been received for the goods" [Tr. p. 19];
>
> "All of the goods had been in the Kansas City warehouse for at least 8 months prior to their destruction by flood" [Tr. p. 18].

Since the policy was "read and retained without objection by the defendant" [Tr. p. 17], there is no claim of any unusual or technical meaning to the words "in storage," and defendant Exchange Lemon has at no time up to and including the present date made any attempt to reform the policy, the trial court was amply justified in viewing the contract in its entirely together with the stipulated facts and entering judgment for plaintiff.

If the policy covered goods in storage under the clause "but only while in due course of transit" [Tr. p. 23] there would have been no reason for the exclusion of "and not if such property is in storage," [Tr. p. 23] which certainly is clear, unambiguous and to which language no explanation has been claimed or offered by appellant. It is quite conceivable that the goods might end up in a warehouse through an interruption in transportation and still be "in due course of transit," in which case they would never have arrived at the destination to which they were consigned. Such a situation can be readily conceived in the case of temporary interruption of transportation service, but the conclusion that an ambiguity exists because property "in storage" is specifically excluded from the coverage wholly fails. In the present case the goods had arrived at the destination shown on the bills of lading. It is a general rule which applies to policies of insurance that where a contract is susceptible on its face to a construction that is reasonable, resort cannot be had to evidence of a custom or usage to explain the language. (*Orient Mutual Ins. v. v. Wright,* 68 U. S. 456, 17 L. Ed. 505.) Whatever may be the general trade meaning of a particular term, such meaning is "always controlled by the express contract of the parties." (*Browning v. McNear,* 158 Cal. 525.) Usage is never admissible to vary the terms of a clear and unambiguous contract. (*May v. American Trust Co.,* 135 Cal. App. 385.)

In ascertaining the intention of the parties to this contract, which provides coverage loss by fire and flood, among other things, it is important to note that the defendant Exchange Lemon took out a separate and distinct policy of insurance, which policy is not involved in

this action, insuring the identical goods against loss by fire while in Crooks Terminal Warehouse [Tr. p. 19]. It is inconceivable that good business custom would require the payment of a separate premium for fire protection if the goods were actually considered to be insured under the transportation policy here in question. The court may also consider the fact that the policy of insurance under consideration was issued in 1946, that it was read and retained by defendant without objection [Tr. p. 17], and that this is not an action for reformation of the policy.

The term "only while in due course of transit" [Tr. p. 23] is far from identical with the term "registered for storage in transit" contained in the freight bill [Tr. p. 30], particularly when construed with the exclusionary language of the policy "and not if such property is in storage." The term "registered for storage in transit" appears nowhere in the insurance policy and is of importance only on the question of the applicable freight rate as between defendant and the railroad.

(a) Defendant's Offer of Proof Is Defective.

Defendant Exchange Lemon has, by it offer of proof, attempted to prove the meaning of the term " 'transit' or 'in transit' " in the transportation trade [Tr. pp. 47, 53] and of the term "transit privilege" [Tr. pp. 53, 57], and of the term "storage in transit" [Tr. pp. 57, 58, 63], but there is no offer to interpret, identify or clarify the actual term used in the contract of insurance, which is, "but only while in due course of transit and not if such property is in storage" [Tr. p. 23].

The proffered testimony of witnesses based upon incomplete hypothetical questions [Tr. pp. 54-55, 58-59] is

fatally defective for the same reason, since we are not concerned with the term "in due course of transit" removed from its neighboring and qualifying words contained in the policy, but rather with the entire contract as evidenced by the entire policy of insurance. Additionally, the opinions, based upon the hypothetical questions, are incompetent and non-probative. Custom and usage is a matter of fact and not of opinion and can only be established (in a proper case) by instances of actual practice and cannot be proven by the opinion of the witness.

See:

Shipley v. Pittsburgh L. E. R. Co. (D. C., Pa., 1946), 68 Fed. Supp. 395;

Ames Mercantile Company v. Kimball S.S. Co., 125 Fed. 332.

The matter contained in the "offer of proof" is further inadmissible for the reason that a written contract containing the entire agreement of the parties supersedes all prior and contemporaneous negotiations. (*Schmidt v. Mano Const. Co.,* 119 Cal. App. 2d 717, 260 P. 2d 230; *Kalnanobitz v. Rempp,* 111 Cal. App. 2d 242, 244 P. 2d 457.) Even if this rule were to be deemed inapplicable, still the offer of proof going to show what was meant by an isolated part of a phrase in the contract is not probative of the meaning of the contract when taken as a whole. The defendant, by its brief at page 13, discusses the knowledge of James S. Jennings, agent of plaintiff Home Insurance, of the term "storage in transit." The difficulty in allowing any weight to such testimony, even if testimony were admissible, is that the term "storage in transit" is nowhere to be found in the insurance policy, which

insures the goods "only while in due course of transit *and not if such property is in storage.*" (Emphasis added.)

Conclusion.

Appellee respectfully submits that for the reasons set forth in the memorandum of decision of the Honorable Trial Judge [Tr. pp. 67-73] and for the reasons set forth in this brief, the Trial Court committed no error and judgment was properly entered in favor of plaintiff. Appellee therefore respectfully prays that, upon the record presented and the authorities cited, this Court sustain and affirm the judgment.

Respectfully submitted,

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